83-523

CASE NO. _____
UNITED STATES SUPREME COURT
OCTOBER 1983 TERM

CUYAHOGA VALLEY HOMEOWNERS AND RESIDENTS ASSOCIATION, AND DAVID HAZELWOOD, Petitioners

vs.

CECIL D. ANDRUS, Secretary of The Department of Interior and WILLIAM H. WHALEN, Director of The National Park Service, and WILLIAM BIRDSELL, Superintendent of The Cuyahoga Valley National Recreation Area, Respondents

On writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

Petition for Certiorari

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PETITION FOR CERTIORARI
QUESTIONS PRESENTED

1. Whether the District Court properly construed the Plaintiff-Petitioners statutory rights under the Cuyahoga Valley National Recreation Area Act, despite the requirement in the act that "Fee title for [family residences] shall not be acquired unless the Secretary finds that such acquisition is necessary to fill the purposes of...the CVNRA Act," and the rigid two stage planning requirements articulated in the CVNRA Act. See 16 U.S.C. §§ 460ff-1(c), 460ff-1(e), 460ff-2, 460ff-5(b).

2. Whether the broad discretion which the federal judiciary is required to grant to the governmental condemning authority, under the Due Process Clause of the Fifth Amendment, applies to condemnation actions which unnecessarily intrude on the constitutional privacy interest enjoyed by family members in their residential homesteads. Thus this court must decide whether the Due Process Clause and Moore v. The City of East Cleveland, 431 U.S. 494 (1977), limits Berman v. Parker 348 U.S. 26, (1954) in light of the fact that Berman explicitly excluded residential condemnations from its rule. See Berman at 31.

IN THE SUPREME COURT OF THE UNITED STATES

CUYAHOGA VALLEY HOMEOWNERS AND RESIDENTS ASSOCIATION,

AND

DAVID HAZELWOOD

Petitioners

V.

CECIL D. ANDRUS SECRETARY OF THE DEPARTMENT OF INTERIOR, AND

WILLIAM H. WHALEN DIRECTOR OF THE NATIONAL PARK SERVICE, AND

WILLIAM BIRDSELL, SUPERINTENDENT OF THE CUYAHOGA VALLEY NATIONAL RECREATION AREA

Respondents

PETITION FOR CERTIORARI TO THE UNITED STATES SIXTH CIRCUIT COURT OF APPEALS

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* This Petition for Certiorari is typed pursuant to Supreme Court Rules 33.1(c) and 33.3, authorizing 65 pages for a typed Certiorari petition.

privacy interests enjoyed by family members in their residential homestead. Thus this court must decide whether the Due Process Clause and Moore v. The City of East Cleveland, 431 U.S. 494 (1977), limits Berman v. Parker 348 U.S. 26, (1954) in light of the fact that Berman explicitly excluded residential condemnations from its rule. See Berman at 31.

BASIS FOR SUPREME COURT JURISDICTION

On July 6, 1983, the United States Sixth Circuit Court of Appeals filed its final judgment in this case. United States Supreme Court review of that final judgment is sought today by means of a Petition for Certiorari pursuant to the grant of Supreme Court jurisdiction articulated in 28 U.S.C. Section 1254.

I
STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

On October 19, 1978 petitioner-plaintiffs, the Cuyahoga Valley Homeowners and Residents Association and David P. Hazelwood, filed the above-captioned case as a class action seeking declaratory and injunctive relief against the following defendants: (1) Cecil D. Andrus, who, at the time the complaint was filed, was the Secretary of the United States Department of the Interior; (2) William H. Whalen, who, at the time the complaint was filed, was the Director of the United States Department of the Interior; and (3) William Birdsell, who, at the time the complaint was filed, was the Superintendent of the Cuyahoga Valley National Recreation Area, (hereinafter, CVNRA), established pursuant to 16 U.S.C. § 460ff et. seq. Each defendant was sued in his official capacity and the suit sought a judicial interpretation of the defendant officials' statutory authority to acquire

single-family residential property located within the boundaries of the CVNRA through condemnation proceedings. Jurisdiction was invoked under 28 U.S.C. § 1331 and 2201. On July 16, 1979, the plaintiffs filed a joint motion for summary judgment. On October 4, 1979, the defendants filed a joint motion for summary judgment.

On April 13, 1982, the District Court issued a Memorandum of Opinion in support of its order granting the Governmental Defendants' Motion for Summary Judgment and denying the plaintiff's Motion for Summary Judgment. The errors in that ruling are the subject of this Petition for Certiorari.

On May 7, 1982, the plaintiffs filed a Notice of Appeal to the United States Court of Appeals for the Sixth Circuit, pursuant to 28 U.S.C. Section 1291. On July 6, 1983, that Court of Appeals filed its final judgment validating the District Court's April 13, 1982 ruling by holding: (1) The District Court sustained original

jurisdiction over the plaintiffs compliant; (2) the District Court accurately construed the scope of the defendants statutory authority under 16 U.S.C. § 460ff et. seq.; (3) the District Court accurately determined that §§ 460ff et seq. does not violate plaintiffs due process privacy rights under Moore v. City of East Cleveland, 431 U.S. 494 (1977). The Court of Appeals affirmation of the District Court's opinion is the subject of this Petition for Certiorari.

B. FACTUAL BACKGROUND

On December 27, 1974, Congress enacted the CVNRA Act, 16 U.S.C. § 460ff et. seq., which ultimately provided that 36,000 acres of land located in the State of Ohio and known as the Cuyahoga Valley shall be converted into a national recreation area. The Act authorizes the Secretary of the United States Department of Interior to employ its condemnation power to acquire those parcels of land required for park use. The Act also contains explicit restrictions with regard

to the acquisition of residential properties encompassed within the definition of "improved property" provided by 16 U.S.C. § 460ff-1(e), which is quoted at footnote 5 of the District Court's opinion. See Appendix attached hereto. The plaintiffs' claims pertain only to "improved property" as that term is used in the Act.

The Cuyahoga Valley Homeowners and Residents Association is a nonprofit, unincorporated organization comprised of over 120 families who reside in the zone designated as the CVNRA. The Homeowners and Residents Association filed this action on behalf of its membership, which is alleged to be "seriously threatened by the imminent probability that the defendants will unlawfully assert eminent domain actions against their Fee Simple Titles," and on its own behalf "because the threatened unlawful conduct of the defendants will deplete the Association's membership. . . ." Compliant, pp. 2-3, Paragraph 4. See: OHIO REV. CODE ANN. § 1745.01 (Page 1955).

David P. Hazelwood owns a residence within the zone designated as the CVNRA. He is also a member and officer of the Cuyahoga Valley Homeowners and Residents Association. Hazelwood's residence is listed for fee acquisition in the "Final General Management Plan," for the CVNRA published in 1977 by the United States Department of the Interior in conjunction with the National Park Service.

The thrust of the plaintiffs' complaint is essentially threefold: first, the plaintiffs claim that the defendants wrongfully exceeded their narrow power of condemnation in violation of 16 U.S.C. 460ff-1(c). In support of their position, the plaintiffs point to the testimony of the architect of the 16 U.S.C. § 460ff-1(c), Congressman Seiberling, who testified regarding that section at a Congressional Hearing in Akron, Ohio:

> "Mr. Seiberling: thank you for an excellent statement.

I would simply like to say that the park plan that was developed by the National Park Service and the study that they made 2 years ago would envision taking by acquisition, purchase, between 26 and 30 residences in the entire valley. We are not talking about dispossessing a large number of people. And as you know, Mr. Floberg, the bill provides that those people have the option of taking a 25 year or a life term so that nobody could be turned down out of his home. I think that to me this is getting on to the point where it almost affects no one's ability to continue living where the are." (Emphasis added.)

See Hearing Before The Sub-Committee on National Parks and Recreation, of the Committee On Interior and Insular Affairs House of Representatives, 93rd Congress, 2nd Session, H.R. 7167 and Related Bills, Page 144.

The plaintiffs pointed out to the Lower Courts that the result of the Section 460ff-1(c) fee title condemnation authority differs markedly from the result guaranteed by Congressman Seiberling, the drafter of Public Law 93-555 (16 U.S.C. § 460ff et. seq.). William Birdsell, the CVNRA's Superintendent, stated in his August 17, 1979 deposition, which was before the District Court, that of the approximately 500 single-family residences located within the original boundaries of the CVNRA, approximately 300 of such residences had been acquired in Fee Title by the National Park service. See August 1979 testimony of William Birdsell in Appendix page A-66 attached hereto. The figure of 300 Fee Title, single-family residential condemnations does not include fee title condemnation actions pending as of August 17, 1979. The Plaintiffs also pointed out to the District Court that even Superintendent Birdsell admitted saying that the decision to acquire fee title to improved property, based solely on the 1977 General Management

Plan is at least sometimes arbitrary. See Quotation from Birdsell's 2/6/79 Deposition in Appendix page A-61 attached hereto.

Congress exhibited its displeasure with the National Park Service's arbitrary interpretation of 16 U.S.C. § 460ff et seq when Congressman Seiberling (the author of the CVNRA Act) and Senator Metzenbaum of Ohio both wrote the Director of the National Park Service on March 14, 1980 stating:

> "...we recommend that the National Park Service thoroughly reevaluate its land acquisition program in the Cuyahoga Valley National Recreation area and in the meantime that all individual residents whose land is subject to complaint action be notified that the suit will be suspended or dropped unless the resident expressly requests completion of the complaint action." (Emphasis added.) See letter in Appendix attached hereto at A-71.

The NPS never heeded Congressman Seiberling's and Senator Metzenbaum's requests.

The plaintiffs' complaint also asserted that the Governmental Defendants' arbitrary residential land acquisition tactics regarding family homesteads violated the Fifth Amendment Due Process rights of the families living within the CVNRA, and that the defendants' land acquisition plan is not supported by a reasonable, detailed or lawfully prepared Master Plan and/or Environment Impact Statement, (hereinafter EIS), in violation of 16 U.S.C. § 460ff-5(b) and the National Environmental Policy Act, 42 U.S.C. § 4331 et. seq.

II.

THIS COURT SHOULD GRANT CERTIORARI IN THIS CASE BECAUSE BOTH THE COURT OF APPEALS AND THE DISTRICT COURT ERRONEOUSLY ABDICATED TO THE NATIONAL PARK SERVICE THEIR JUDICIAL RESPONSIBILITY TO CONSTRUE THE PLAINTIFFS' STATUTORY RIGHTS UNDER THE CVNRA ACT.

A. THE LOWER COURTS DID NOT RECOGNIZE THAT THE GOVERNMENT'S AUTHORITY TO CONDEMN PRIVATE PROPERTY IS LIMITED TO THE EXPRESS CONDEMNATION AUTHORITY EXTENDED BY CONGRESS.

The First issue which must be resolved whenever a homeowner challenges the Government's rights to condemn his residence, is, Whether the condemning agency sustains express statutory authority to initiate the condemnation action. This fundamental principle was expressed by five Justices of the United States Supreme Court in United States ex. rel. T.V.A. v. Welch, 327 U.S. 546, 551-552 (1946) when they stated:

> "We think that it is the function of Congress to decide what type of taking is for public use. It is true that this Court did say in Cincinnati v. Vester, 281 U.S. 439, 446, that "it is well established that in considering the appli-

cation of the Fourteenth Amendment to cases of expropriation of private property, the question what is a public use is a judicial one." But the Court's judgment in that case denied the power to condemn 'excess' property on the ground that the state law had not authorized it."

Mr. Justice Reed, joined by the Chief Justice, authored a concurring opinon in Welch supra in which these two Justices independently stressed the requirement that the Government enjoy express statutory authority before embarking on the exercise of its condemnation power. Justice Reed stated in Welch supra, at 556-557:

"(The) argument of a lack of judicial power properly was rejected by the Circuit Court of Appeals although, as explained above, I think that court erroneously held that the T.V.A. Act did not authorize these condemnations. 150. F.

2d 613, The T.V.A. is a creature of its statute and bound by the terms of that statute, and that its every act may be tested judicially, by any party with the standing to do so, to determine whether it moves within the authority granted to it by Congress.

This taking is for a public purpose but whether it is or is not is a judical question... [The] constitutional doctrine of the Separation of Powers would be unduly restricted if any administrative agency could invoke so-called political powers so as to immunize its action against judicial examination in contests between the agency and the citizen."

Thus, Welch, supra irrefutably establishes that the Government may not condemn private property unless it sustains statutory authorization from Congress to do so. The Welch Court reversed the Court of Appeals

upon the express determination that the statute involved in Welch did authorize the Government's condemnation action in that case.

In stark contrast with the Welch statute, the homeowners in this action contend that 16 U.S.C. § 460ff et. seq., embodies a congressional intention that the Government avoid condemning fee title to improved residential property unless it can establish that such residential property is needed for "direct visitor use." The deliberate Congressional intention to statutorially limit the Government's condemnation authority under 16 U.S.C. § 460ff et. seq. distinguishes the ultimate result in this case from the ultimate result in Welch.

Yet, the Lower Courts totally abdicated their responsibility to construe the meaning of the CVNRA Act. In reliance on Berman v. Parker, 348 U.S. 26 (1954). See District Court's Opinion (Appendix pages A-9, A-16, A-17, A-26 and Court of Appeals Opinion of Apendix pages A-56, A-57.) The Lower Courts failed to recognize that each of the cases, including Berman, which authorize the Government to exercise broad constitutional authority when condemning private real property, dealt with the acquisition of land which did not comprise the residential homestead of the condemnee. For example, see Welch supra, at 548 (No showing that the condemned land was comprised of residential homesteads); Carmak v. United States, 329 U.S. 230, 231 (1946). (Federally condemned land was held in trust by a City, which used it for a local park, courthouse, city hall, public library); Berman, supra., at 31 where Justice Douglas went out of his way to note:

"Appellants own property in Area B at 714 Fourth Street, S.W. It is not used as a dwelling or place of habitation. A department store is located on it." (Emphasis added.)

That important distinction between this case and the Berman line of decisions was pinpointed in the Plaintiffs' District Court and Court of Appeals Briefs. Mysteriously, neither of the Lower Courts addressed this distinction in their opinions. Instead, the Lower Court mutely applied the lightest possible scrutiny in reviewing the Defendants' family homestead condemnation standards. See Appendix A-56, A-57.

B. CONGRESS EXPLICITLY INTENDED TO PROTECT INDIGENOUS COMMUNITIES FROM NATIONAL PARK SERVICE ABUSE DURING THE CREATION OF THE PARK AND IRREFUTABLY INTENDED TO CREATE A LAND ACQUISITION SYSTEM WHICH DENIED THE NATIONAL PARK SERVICE THE AUTHORITY TO CONDEMN THE COMPLETE INTEREST

WHICH A PARK RESIDENT ENJOYED IN HIS HOMESTEAD UNLESS SUCH WAS NEEDED FOR DIRECT VISITOR USE.

When Congress enacted the Cuyahoga Valley National Recreation Act, 16 U.S.C. § 460ff et. seq., it articulated its affirmative intention to limit the disruption which the creation of the Park would cause to local institutions and particularly residents inside the park area. Congress' intention to minimize abusive tactics by the National Park Service appears in connection with 16 Section 460ff-3(f) which directs the Secretary of the Interior to consult with local governments in establishing zoning laws that will be conducive to the goals of the Recreation Area. However, the Congress was concerned that the National Park Service would abuse this provision, and consequently, the Legislative History of the Park Act expresses Congress' concern that the Park Service would "coerce or badger local subdivisions or. . . attempt

to preempt their constitutional authorities." See 1974 U.S. Code Cong. and Admin. News, pages 6654-55, 6658.

Just as the Congress saw the need to express its intention that the Park Act was not to be employed by the Park Service as a vehicle for coercing or badgering local governmental institutions, the Congress also saw the need to craft statutory protections, in the form of residential property retention rights, to avoid unneeded disruption or abuse of the homeowners who dwell within the park's boundaries. Thus, Section 460ff-1(e) of the Park Act created a definition for the term "IMPROVED PROPERTY" which included single-family residential property. The controlling language reads:

> "For the purposes of sections 460ff to 460ff-5 of this title, the term 'improved property' means: (i) a detached single-family dwelling, the construction of which was begun before January 1, 1975 (hereafter referred to as 'dwelling'),

> together with so much land on which the dwelling is situated, the said land being the same ownership as the dwelling, as the Secretary shall designate, for the sole purpose of noncommercial use, together with any structures necessary to the dwelling which are situated on the land so designated. . ."

Homeowners, who enjoyed the special Congressionally conferred status of "improved property" owner, were furnished a statutory guarantee that regardless of the gravity of the Government's need for their improved property, they enjoy the absolute right to retain title to a life estate or a term of up to twenty-five years. The homeowner's absolute statutory right against Governmental condemnation of a life estate and/or a twenty-five year estate is codified in Section 460ff-1(f). The Legislative History of Section 460ff-1(e), (f) confirms Congress'

intention that these provisions operate as an express barrier to governmental condemnation of a homeowner's life estate and/or term of years estate, so long as his improved property is employed as a single-family dwelling. See 1974 U.S. Code Cong. and Admin. News, pages 6656 thru 6657.

Thus, the statutory language of Section 460ff-1(e), (f), as well as the Legislative History of those provisions, and the National Park Service's own interpretation irrefutably demonstrate that when Congress drafted 16 U.S.C. § 460ff et. seq., it intended to create an express and absolute statutory limitation on the Government's authority to condemn the complete property interest which the Park residents enjoy in their homesteads. The Park Service even admits that the Section 460ff-1(e), (f) statutory limitation on the Government's condemnation authority operates regardless of the immediacy of the Government's need to acquire possession of the residential property. See District Court Opinion at Appendix page A22 infra.

C. CONGRESS INTENDED TO LIMIT THE GOVERNMENT'S AUTHORITY TO CONDEMN THE FEE TITLE TO RESIDENTIAL IMPROVED PROPERTY TO SITUATIONS INVOLVING DETRIMENTAL USE OF SUCH PROPERTY, OR SITUATIONS IN WHICH SUCH PROPERTY WAS NECESSARY FOR "DIRECT" PARK "VISITOR USE."

As part of the Congress' scheme to protect local interests from obliteration by the process of park creation, Congress extended extremely narrow statutory authority to the National Park Service to condemn Fee title to Residential, "Improved Property" within the definition of Section 460ff-1(e). Section 460ff-1(c) expresses the narrow statutory authority which Congress intended the National Park Service to sustain when it seeks to acquire fee title to such statutorially protected residential realty:

> "With respect to improved properties...the Secretary may acquire scenic easement or

such other interests as, in his judgment, are necessary for the purposes of the recreation area. Fee title to such improved properties shall not be acquired unless the Secretary finds that such lands are being used, or are threatened with uses which are detrimental to the purposes of the recreation area, or unless such acquisition is necessary to fulfill the purposes of sections 460ff to 460ff-5 of this title." (Emphasis added.)

Thus, the first clause of Section 460ff-1(c) purports to extend blanket authority to the Secretary to acquire "scenic easements or such other interests" in park dwellers' domestic homesteads. However, the next sentence explicitly forbids the acquisition of "Fee title" to such dwellings ("Fee title...shall not be acquired"), except in two very narrow circumstances:

(1) A dwelling place is being used for purposes that are detrimental to the park; or

(2) The acquisition of Fee Title, as opposed to the less intrusive acquisition of a scenic easement, is necessary to fulfill the purposes of the park.

The Lower Courts rubberstamped the National Park Service's argument that the exception number two supra virtually swallows up the general rule that "fee title to improved residential properties shall not be acquired." See 16 U.S.C. § 460ff-1(c). Under the Government's theory, Congress intended the Secretary's determination of the necessity to condemn the Fee title to a family dwelling place to be conclusive on the questions of the necessity of such a condemnation. Several reasons compel the conclusion that the Government's interpretation of Congress' intent

is erroneous. However, neither of the Lower Courts addressed these reasons, and therefore, this Court should grant Certiorari to correct the Lower Courts defective construction of Congress' statutory intent.

FIRST. If Congress actually intended the Secretary to enjoy the plenary authority noted by the Government to condemn fee title to the specially protected class of residential improved property, then the language of § 460ff-1(c) is unnecessarily clumsy to express such a purpose. If Congress really intended to vest the Secretary with plenary, unreviewable power to condemn Fee title to park residents' dwelling places, then Congress would have simply ended Section 460ff-1(c) at the conclusion of the first sentence of the current provision:

> "With respect to improved properties, the Secretary shall acquire scenic easements or such other interets as, in his judgment are necessary for the purposes of the recreation area." (Emphasis added.)

The first sentence of Section 460ff-1(c), standing alone, is perfectly adequate to convey the supposed Congresional intention which the Government, and the Lower Courts, have thus far interpreted as the meaning of the last sentence. In other words, the Lower Courts interpreted the second sentence--

> "Fee title to such improved property shall not be acquired unless the Secretary finds that...such acquisition is necessary to fulfill the purposes of sections 460ff to 460ff-5 of this title..."

to express a meaning which is redundant to the plain meaning of the first sentence of Section 460ff-1(c)-

> "With respect to improved properties...the Secretary may acquire scenic easements or such other interest (obviously including fee interets) as in his judgment are necessary for the purposes of the recreation area."

Such an interpretation violates the well-known canon of statutory construction that mandates avoidance of a statutory interpretation which renders part of a statute surplusage. Although this important argument was fully delineated in the Plaintiffs' briefs filed in the Lower Courts, neither the Court of Appeals, nor the District Court explicitly addressed this argument.

SECOND, the Government's, and the Lower Courts', interpretation of Sections 460ff-1(c) also renders another phrase of that provision surplus, in violation of the statutory construction canon against redundant interpretations. If one examines the second sentence in isolation, the Government's reading results in the conclusion that Fee title to park residents' dwelling places shall not be acquired except:

> (1) When the Secretary finds that such dwellings are used for purposes that are detrimental to the purposes of the recreation area; or

(2) When the Secretary, in the exercise of his plenary, unreviewable authority, decides that fee title to residential property is necessary to fulfill the purposes of Sections 460ff to 460ff-5.

The problem with such an interpretation is that it renders the first (i.e., detrimental use) exception a subset of the second (i.e., necessary for park purposes) exception. In other words, if the "necessary for park purposes" exception was intended by Congress to grant the Secretary plenary power to condemn residential property, on a "necessary for park purposes" theory, then there is no need whatsoever to establish a separate exception to justify condemnation of residential property that is used in a fashion which is "detrimental to the purposes of the recreation area." Obviously, every occasion in which homestead property is condemned

because it is used in a fashion detrimental to the purposes of the park, is equally justified on the separate theory that such acquisition of the detrimentally employed property was "necessary to fulfill the purposes" of the park act, i.e., the purposes which are jeopardized by the detrimental use!

Thus, the Government's interpretation, affirmed by the silence of the Lower Courts, that the last clause of Section 460ff-1(c)* constitutes an expression of Congress' intent to vest the Secretary with plenary, unreviewable authority to condemn fee title to protected residential "improved property" languishes in a double conundrum of redundancy. The Government's statutory interpretation, which rests on the assumption that several phrases of Section 460ff-1(c) comprise syntactic surplus, is particularly suspect because

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* The last clause of Section 460ff-1(c) reads:

"Fee title to such improved property shall not be acquired unless the Secretary finds that...such acquisition is necessary to fulfill the purposes of sections 460ff to 460ff-5 of this title."

it clashes with the ancient canon of statutory construction which abhors all interpretations that render a portion of statute useless. In Washington Market Company v. Hoffman, 101 U.S. 112, 115-16 (1879), the United States Supreme incorporated this canon of construction into the statutory interpretation rules which the Federal Judiciary must observe when the High Court wrote:

> "We are not at liberty to construe any statute so as to deny effect of any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every work. As early as in Bacon's Abridgement, Sect. 2, it was added that 'a statute ought, upon the whole, to be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.' This rule has been repeated innumerable

times. Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each."

(Emphasis added.)

In light of the patent invalidity of the Lower Courts' interpretation of the Government's fee condemnation authority, under 16 U.S.C.§ 460ff et. seq., this Court should grant Certiorari to review the interpretation of that enactment in light of its Legislative History, as expressed in the published Legislative Committee Reports and Hearings. The United States Supreme Court endorsed the use of published legislative history, in the form of published Committee Reports and Hearings in Duplex Printing Press Company V. Derring, 254 U.S. 443, 474-475 (1920).

The Legislative History of the Park Act, as published in the Report of the Senate Interior and Insular Affairs Committee (Senate Report No. 93-1328), is published at 1974 U.S. Code Cong. and Admin. News, page 6649 et. seq. The Legislative History suggests that the Lower Courts should have scrapped the Government's interpretation that Section 460ff-1(c) expresses a Congressional intent to vest plenary power in the Secretary of the Interior to condemn fee title to the otherwise specially protected class of residential improved property. Examination of the Legislative History of the Park Act compels the conclusion that Congress intended that most single-family dwelling places, which constitute improved property under the Act, be acquired solely in scenic easement, and that fee title to such dwellings should be condemned only when the improved property is shown to be "needed for direct visitor use."

FIRST, Congressman Seiberling, the architect of the CVNRA Act testified that only 26-30 homes would be acquired in Fee, when in fact, 300 of the original 500 homes were acquired in fee. SECOND, In March 1980, Congressman Seiberling and Senator Metzenbaum both wrote the National Park Service, requesting that it cease acquiring family homesteads and that it dismiss all pending condemnations, after the National Park Service acknowledged acquiring over 300 homes in fee title. THIRD. Legislative History of the Act states:

> "The use of scenic easements should also be a major part of the land acquisition program for the area. The intent here is to allow fee acquisition to be concentrated in those areas needed for direct visitor use, while acquisition funds can be spent to protect a larger surrounding area through easements than would be possible by using the same

dollar amounts for the acquisition."

See 1974 U.S. Code Cong. and Admin. News, at page 6655. (Emphasis added.)

In a passage discussing the types of property which the Secretary should expect not to acquire, the Legislative History includes fee title to residential "improved property," and suggests that the Secretary should emphasize scenic easement acquisition with respect to residential "improved property."

"Fee title to any improved properties in the area is not to be acquired unless the Secretary finds that such properties are used or being threatened with uses detrimental to the purposes of the recreation area, or unless fee acquisition is necessary to fulfill the purposes of the Act. The Secretary may, however, acquire

scenic easements as he deems necessary on such properties. Obviously, where appropriate scenic easements have already been granted to a public body, the chance of adverse uses occurring which might be detrimental to the recreation area is precluded, and these properties can generally be left under the existing easements."

See 1974 U.S. Code cong. and Admin. News, at page 6656. (Emphasis added.)

The Legislative History of the Park Act also indicates that the two-stage planning effort which the Congress statutorially mandated was designed in part as a monitoring device to insure that the Secretary implemented Congress' intention that condemnation, in fee, of residential "improved property" occur only when the fee title to such improved property was "necessary to fulfill the purposes of the Park Act," in the sense that fee title to such residetial

improved property is "directly needed for park visitor use." See 16 U.S.C. § 460ff-1(c), 1974 page 6657. See also two stage planning process statutorially mandated by 16 U.S.C. §§ 460ff-2, 460ff-5(b).

The Lower Court's failure to construe the CVNRA Act, in light of its Legislative History, to limit residential fee title condemnations to homesteads "directly needed for park visitor use," is a clear error which should be reviewed by this Court's Certiorari authority in order to affirm the proper method of statutory construction in the context of a Congressional effort to protect family residences from bureaucratic abuse. This Court can not tolerate the Lower Courts rubberstamping of a bureaucratic statutory interpretation which frustrates the intent of Congress to protect the sanctity of family dwelling places.

III

THIS COURT SHOULD GRANT CERTIORARI TO DECIDE THE PLAINTIFFS' NOVEL, IMPORTANT CLAIM THAT MOORE V. CITY OF EAST CLEVELAND CONSTITUTIONALLY LIMITS THE GOVERNMENT'S CONDEMNATION AUTHORITY.

THE LOWER COURT NEVER ANALYSED THE PLAINTIFF-PETITIONERS' CLAIMS THAT THE GOVERNMENT'S SINGLE-FAMILY HOMESTEAD RESIDENTIAL CONDEMNATIONS VIOLATE THEIR DUE PROCESS PRIVACY RIGHTS UNDER THE FIFTH AMENDMENT AND MOORE V. CITY OF EAST CLEVELAND.

Both Lower Courts affirmed, without analysis, the Government's assertion that it sustains the constitutional authority to acquire a family's homestead, pursuant to statutory authority like that expressed in 16 U.S.C. § 460ff-1(c), when the Government sustains the burden to show that, in its "opinion," such a forced acquisition of a family's home is "expedient"

for the public purpose expressed in the taking statute. The Government's argument violates the Due Process and Privacy notions expressed in the Fifth and Fourth Amendment, which the United States Supreme Court developed in cases decided long after Shoemaker v. United States, 147 U.S. 282 (1893); United States ex rel TVA v. Welch, d327 US 546 (1946); United States v. Carmak, 329 U.S. 230 (1946); Berman v. Parker, 348 U.S. 26 (1954), on which the Lower Courts relied.

FIRST, neither of the Lower Courts recognized that each of the cases which authorize the Government to exercise broad constitutional authority when condemning private real property, dealt with the acquisition of land which did not comprise the residential homestead of the condemnee. For example, see Welch supra, at 548 (No showing that the condemned land was comprised of residential homesteads): Carmak, supra at 231 (Federally condemned land was held in trust by

a City, which used it for a local park, courthouse, city hall, public library); Berman, supra at 31 where Justice Douglas went out of his way to note:

> "Appellants own property in Area B at 714 Fourth Street, S.W.. It is not used as a dwelling or place of habitation. A department store is located on it." (Emphasis added.)

SECOND, in Moore v. City of East Cleveland, 431 U.S. 494 (1977), Inez Moore violated an East Cleveland zoning ordinance, which denied her the right to reside in her single family residential dwelling with her grandchildren, who were "illegal occupants" under the applicable zoning code. The Cuyahoga County Court of Appeals affirmed a lower court finding that the applicable ordinance was constitutional and Moore appealed to the United States Supreme Court, which reversed the Court of Appeals on Due Process grounds.

In Moore, Justice Powell recognized that Governmental action which impinges on "family needs" and "family values" must satisfy an especially high standard of judicial review. See Moore, supra, at 498. Justice Powell noted the standard for judicial review of such ordinances when he wrote at 499:

> "When a city undertakes intrusive regulations of the family...the usual judicial deference to the legislature is inapproprite. 'This Court has long recognized that freedom of personal choice in matters of...family life is one of the liberties protected by the Due Process Clauses of the Fourteenth Amendment...A host of cases...have consistently acknowledged a private realm of family life which the state cannot enter...(W)hen the government intrudes on choices concerning family living arrangements, this Court must examine carefully the

> importance of the governmental interests advanced and the extent to which they are served by the challenged regulations.'"

In applying the "careful scrutiny" test to examine the importance of the governmental interests advanced, and the extent to which those interests were served, by the East Cleveland ordinance, the Moore Court determined that the bare language of East Cleveland's ordinance implemented the facially legitimate governmental interests of preventing overcrowding and minimizing traffic, parking congestion and avoiding an undue financial burden on the municipality. See Moore supra, at 499-500. However, the Court invalidated East Cleveland's ordinance under the Due Process Clause because the ordinance only "marginally serve(d)" the City's legitimate interests. See Moore supra, at 500. Similarly, the Government has shown no need to acquire the entire fee simple

estate in the Plaintiffs' homes. Such acquisitions only marginally serve the interests of creating the CVNRA. But, more importantly, neither of the Lower Courts endorsed the application of the Moore, "careful scrutiny," test to the Homeowners claims. The applicability of the Moore test to the expropriation of family homesteads is the critical issue which this court must grant Certiorari to review!

THIRD, a citizen's residential premises form the focus of the privacy interests which the United States Supreme Court has most rigorously protected from Government interference. See lengthy citation in the Appendix attached hereto at page(s) A-58 infra.

In fact, a citizen's residential privacy interests have been deemed so weighty under constitutional analysis that the United States Supreme Court historically questioned whether the government may enter private residential premises without a warrant or exigent circumstances to effectuate

an arrest. See United States v. Watson, 423 U.S. 411, 418, fn. 6, (1976); Gerstein v. Pugh, 420 U.S. 103, 113, fn. 13, (1975); Coolidge v. New Hampshire, 403 U.S. 443, 474-481, (1971); Davis v. Mississippi, 394 U.S. 721, 78, (1969); Jones v. United States, 357 U.S. 493, 499-500, (1958).

Neither the Government, or the Lower Courts, offered a rebuttal to the Plaintiffs' argument that the Constitutional Privacy case law recognizes a special protection for a citizen's home, on which the Government may not intrude without a more substantial justification than the fickle, flimsy reasons articulated in this Petition supra. The cases analyzed in the Appendix at A-58 and Part III, of this Plaintiff-Petitioners' petition establish this principle, which the High Court recently repeated in Payton v. New York, 445 U.S. 573 (1980); and Steagald v. United States, 451 U.S. 204 (1981).

In Payton supra the High Court held that the Constitutional Right

of Privacy prohibits Government from making a warrantless and nonconsensual, probable cause entry into a citizen's home, inorder to perfect a felony arrest. In so holding, the Court relied on the unique privacy interest that United States citizens enjoy in their homes. See Payton supra, at 585-590. The Payton Court expanded on this theme in footnotes 13 and 17, 445 U.S., at 578-582. In Steagald v. United States, 451 U.S. 204 (1981), the High Court recognized the greatly protected nature of the home as a sanctuary of privacy into which Government may not intrude for a trifling reason. In Steagald supra, the High Court suppressed evidence found in Steagald's home after police officers entered Steagald's home, acting under an arrest warrant for Lyons, who's arrest the officers sought to perfect within Steagald homestead. The Steagald Court, at 451 U.S., 212-216, invalidated the governmental entry into a citizen's residence for the lofty governmental

purpose of accomplishing an otherwise lawful probable cause arrest, because such an entry violated the privacy rights of the resident.

The Payton, Steagald, and Moore v. City of East Cleveland cases conclusively establish that the Government requires weightier interests than the featherweight interests to which the Lower Courts deferred in order to permit the Government to intrude upon families constitutionally protected privacy interests by seizing fee title to their homesteads. The Lower Courts' denigration of the Plaintiff-Petitioners' constitutionally protected family privacy interests is reflected by the Lower Courts' stunning failure to even analyze the Plaintiffs' Moore v. City of East Cleveland argument in either of their opinions. That argument was fully and explictly briefed before the Lower Courts. Certainly the U.S. Supreme Court should, at a minimum, grant Certiorari to review the complex and novel

question of the conflict between the light scrutiny test articulated in Berman supra and the heightened "careful scrutiny" test articulated in Moore supra in the context of unnecessary governmental expropriation of family homesteads.

The issues inherent in the conflict between the Berman test and the Moore test are of major national importance, especially in light of the fact that over 50% of the land in the United States is owned by federal, state, and local governments, with 33% of the land being owned by the federal government. For example, the Government's residential land acquisition practices in the CVNRA are the subject of four major national media pieces released in the last four years, including a one hour Frontline television documentary aired on the Public Broadcasting System in June, 1983, and a six day front page expose in the Cleveland Press. Furthermore, the problems associated with the National Park Service's abusive and

arbitrary land acquisition practices are national in scope, as documented in numerous General Accounting Office Reports issued on this topic in recent years. See The Federal Drive To Acquire Private Lands Should Be Reassessed G.A.O., 12/14/79 (CED-80-14); The National Park Service Should Improve Its Land Acquisition And Management At The Fire Island National Seashore, G.A.O. 5/8/81 (CED-81-78); Federal Land Acquisition And Management Practices, G.A.O. 9/11/81 (CED-81-135) (specifically addressing Cuyahoga Valley at pages 43-45).

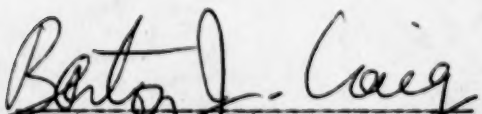
The result of the Lower Courts decisions is that under Steagald, greater judicial scrutiny protects a criminal, hiding out in a home, from governmental intrusion into his privacy rights inorder to perfect a lawful arrest than the judicial protection afforded a family's privacy interest in thwarting governmental confiscation of their homestead. This Court must grant Certiorari to review and

correct this injustice and explicitly articulate, the appropriate Moore v. City of East Cleveland, standard of judicial review for governmental expropriation of single family homesteads.

CONCLUSION

This Court should grant Certiorari to review the questions presented by this case, particularly the conflict between Berman supra and the Due Process privacy rights articulated in Moore supra regarding the standard of judicial review of coerced governmental acquisitions of family homesteads.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CUYAHOGA VALLEY HOMEOWNERS AND RESIDENTS ASSOCIATION, et. al Plaintiff	CASE NO. C78-1377
v.	JUDGE JOHN M. MANOS (FILED APRIL 13, 1982)
CECIL D. ANDRUS, et. al., Defendant	MEMORANDUM OF OPINION

On October 19, 1978 plaintiffs, the Cuyahoga Valley Homeowners and Residents Association and David P. Hazelwood filed the above-captioned case as a class action seeking declaratory and injunctive relief against the following defendants: (1) Cecil D. Andrus, who, at the time the complaint was filed, was

the Secretary of the United States Department of the Interior; (2) William H. Whalen, who, at the time the complaint was filed, was the Director of the United States Department of Interior; and (3) William Birdsell, who, at the time the complaint was filed, was the Superintendent of the Cuyahoga Valley National Recreation Area, (hereinafter, CVNRA), established pursuant to 16 U.S.C. § 460ff.[1] The suit seeks a judicial interpretation of the defendant officials' statutory authority to acquire single family residential property located within the boundaries of the CVNRA through eminent domain proceedings.

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1 16 U.S.C. § 460ff provides as follows:

> For the purpose of preserving and protecting for public use and enjoyment, the historic, scenic, natural, and recreational values of the Cuyahoga River and the adjacent lands of the Cuyahoga Valley and for the purpose of providing for the maintenance of needed recreational open space necessary to the

1. (Continued)

urban environment, the Cuyahoga Valley National Recreation Area, hereafter referred to as the "recreation area," shall be established within six months after December 27, 1974. In the management of the recreation area, the Secretary of the Interior (hereafter referred to as the "Secretary") shall utilize the recreation area resources in a manner which will preserve its scenic, natural, and historic setting while providing for the recreational and educational needs of the visiting public.

Jurisdiction is invoked under 28 U.S.C. § 1331[2] and 2201[3]. On July 16, 1979 plaintiffs filed a joint motion for summary judgment. On October 4, 1979 the defendants filed a joint motion for summary judgment. For the reasons which follow the defendants' motion is granted and the plaintiffs' motion is denied.[4] Fed. R. Civ. P. 56.

On December 27, 1974 Congress enacted the CVNRA Act, 16 U.S.C. § 460ff et seq., which provides that a certain body of land located in the State of Ohio and known as the Cuyahoga Valley shall be converted into a national park. The Act authorizes the Secretary of the United States Department of Interior or his delegate to employ the power of eminent domain to acquire those parcels of land required for park use. The Act also contains explicit restrictions with regard to the acquisition of residential and agricultural properties encompassed within the definition of "improved property" provided by 16 U.S.C. § 460ff-1(e).[5]

2. 28 U.S.C. § 1331 provides as follows:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

3. 28 U.S.C. § 2201 provides as follows:

> In a case of action controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

4. The court need not address any other motions filed in the instant case on the ground of mootness.

5. 16 U.S.C. § 460ff-1(e) provides as follows:

> For the purposes of sections 460ff to 460ff-5 of this title, the term "improved property" means: (i) a detached single family dwelling, the construction of which was begun before January 1, 1975 (hereafter referred to as "dwelling"), together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designate to be reasonably necessary for enjoyment of the dwelling for the sole purpose of noncommercial residential use, together with any structures necessary to the dwelling which are situated on the structures necessary to the dwelling which are situated on the land so designated, or (ii) property developed for

5. (Continued)

property," the Secretary shall take into consideration the manner of use of such buildings and lands prior to January 1, 1975, and shall designate such lands as are reasonably necessary for the continued enjoyment of the property in the same manner and to the same extent as existed prior to such date. In applying this subsection with respect to lands and interests therein added to the recreation area by action.

The plaintiffs' claims pertain only to "improved property" as that term is used in the Act.

The Cuyahoga Valley Homeowners and Residents Association is a nonprofit, unincorporated organization comprised of over 120 families who reside in the zone designated as the CVNRA. It filed this action on behalf of its membership, alleged to be "seriously threatened by the imminent probability that the defendants will unlawfully assert eminent domain actions against their Fee Simple Titles," and on its own behalf "because the threatened unlawful conduct of the defendants will deplete the Association's membership..." Complaint, pp. 2-3, § 4. See: OHIO REV. CODE ANN. § 1745.01 (Page 1955).[6]

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6. OHIO REV. CODE ANN. § 1745.01 (Page 1955), provides as follows:

> Any unincorporated association may contract or sue in behalf of those who are members and, in its own behalf, be sued as an entity under the name by which it is commonly known and called.

David P. Hazelwood owns a residence within the zone designated as the CVNRA. He also is a member and officer of the Cuyahoga Valley Homeowners and Residents Association. Hazelwood's residence is listed for fee acquisition in the "Final General Management Plan, CVNRA," published in 1977 by the United States Department of the Interior in conjunction with the National Park Service.

The thrust of the plaintiffs' complaint is essentially two-fold: first, the plaintiffs claim that the defendant have wrongfully exceeded their narrow power of eminent domain in violation of 16 U.S.C. 460f-1(c)[7] and the Due Process Clause of the Fifth Amendment; and second, that the defendants' land acquisition plan is not supported by a reasonable, detailed or lawfully prepared Master Plan and/or Environment Impact Statement, (hereinafter, EIS), in violation of 16 U.S.C. § 460ff-5(b)[8] and the National Environmental Policy Act, 42 U.S.C. § 4331 et seq. For the reasons which follow the court holds that the plaintiffs' claims are without merit.

7. 16 U.S.C. § 460ff-1(c) provides as follows:

> With respect to improved properties, as defined in sections 460ff to 460ff-5 of this title, the Secretary may acquire scenic easements or such other interests as, in his judgment, are necessary for the purposes of the recreation area. Fee title to such improved properties shall not be acquired unless the Secretary finds that such lands are being used, or are threatened with uses, which are detrimental to the purposes of the recreation area, or unless such acquisition is necessary to fulfill the purposes of sections 460ff to 460ff-5 of this title.

8. 16 U.S.C. § 460ff-5(b) provides as follows:

> For the development of the recreation area, including improvements of properties acquired for purposes of sections 460ff to 460ff-5 of this title, there is authorized to be appropriated not more than $13,000,000. Within one year from the date of establishment of the recreation area pursuant to sections 460ff to 460ff-5 of this title, the Secretary shall, after consulting with the Governor of the State of Ohio, develop and transmit to the Committees on Interior and Insular Affairs of the United States Congress a final master plan for the development of the recreation area consistent with the objectives of sections 460ff to 460ff-5 of this title, indicating:
>
> (1) the facilities needed to accommodate the health, safety, and recreation needs of the visiting public;

8. (Continued)

(2) the location and estimated cost of all facilities; and

(3) the projected need for any additional facilities within the area.

In essence, the plaintiffs' first contention is that under 16 U.S.C. § 460ff-1(c), the defendants may only institute eminent domain proceedings against a fee title owner who resides in the CVNRA if it is shown that the property is being used in a manner detrimental to the purposes of the park and/or if the property is required for direct park visitor use. According to the plaintiffs, under the direct park visitor use theory, the defendants must establish that the property in question is "specifically needed for an identifiable park use," such as a tangible park facility, before they may exercise their statutory eminent domain power. The plaintiffs further contend that even if the defendants established that property was being used in a manner detrimental to the purposes of the park or was required for direct park visitor use, the property could only be acquired subject to the owner's right to elect a life estate or a term less than or equal to twenty-five

(25) years under 16 U.S.C. § 460ff-1(f).[9]

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9. 16 U.S.C. § 460ff-1(f) provides as follows:

> The owner of an improved property, as defined in sections 460ff to 460ff-5 of this title, on the date of its acquisition, as a condition of such acquisition, may retain for himself, his heirs and assigns, a right of use and occupancy of the improved property for noncommercial residential or agricultural purposes, as the case may be, for a definite term of not more than twenty-five years, or, in lieu thereof, for a term ending at the death of the owner or the death of his spouse, whichever is later. The owners shall elect the term to be reserved. Unless the property is wholly or partially donated, the Secretary shall pay to the owner the fair market value of the property on the date of its acquisition, less the fair market value on that date of the right retained by the owner. A right retained

9. (Continued)

by the owner pursuant to this section shall be subject to termination by the Secretary upon his determination that it is being exercised in a manner inconsistent with the purposes of sections 460ff to 460ff-5 of this title, and it shall terminate by operation of law upon notification by the Secretary to the holder of the right of such determination and tendering to him the amount equal to the fair market value of that portion which remains unexpired.

In Berman v. Parker, 348 U.S. 26, 75 S. Ct. 98 (1754), the United States Supreme Court held that the role of the judiciary in determining whether the power of eminent domain is being exercised for a public purpose is an extremely narrow one. In Berman, private property owners challenged the constitutionality of Congressional legislation authorizing the condemination of their property for the purpose of redeveloping the District of Columbia. The Court held that resolution of the question of whether acquisition of full title to the properties in issue was necessary to carry out the project was a question properly left to the agency created by the legislation and was not within the province of the courts. Specifically, the Court held that "[o]nce the question of public purpose has been decided, the amount and character of land to be taken for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." Berman v. Parker, supra, 348 U.S. at 35, 36, 75 S. Ct. at 104.

Since the purpose of CVNRA has clearly "been decided" in favor of "preserving and protecting for public use and enjoyment, the historic, scenic, natural, and recreational values of the Cuyahoga River and the adjacent lands of the Cuyahoga Valley and for...providing for the maintenance of needed recreational open space necessary to the urban environment," 16 U.S.C. § 460ff, and the Secretary of the United States Department of Interior is vested with wide discretion for he "may acquire scenic easements or <u>such other interests</u> [including fee titles] as, <u>in his judgment</u> are necessary for the purposes of the recreation area," 16 U.S.C. § 460ff-1(c), (emphasis added), neither this court nor the plaintiffs can substitute judgment for the Secretary's determination to acquire fee title through the use of the statutory eminent domain power. Accordingly, the plaintiffs' claim that the Secretary's use of the eminent domain power is in violation of the Due Process Clause of the Fifth Amendment is without merit. <u>See: Berman v. Parker, supra.</u>

A similar disposition is required of the plaintiffs' claim that the defendants may only institute eminent domain proceedings against a fee title owner who resides in the CVNRA when it is shown that the property is needed for direct park visitor use, such as a tangible park facility. Althought the plaintiffs mount an elaborate argument premised on the legislative history of the CVNRA Act, it is unnecessary for this court to address that concern in light of the unambiguous grant of power to the Secretary. With respect to "improved property" under 16 U.S.C. § 460ff-1(c), "the Secretary may acquire scenic easements or such other interests as, in his judgment, are necessary for the purposes of the recreation area." As noted above, there can be no doubt that fee title acquisition is encompassed by "such other interests." In any event, the legislative history of the Act does not support the plaintiff's claim. In pertinent part, the legislative history of the CVNRA provides as follows:

> The use of scenic easements should also be a major part of the land acquisition program for the area. The intent here is to allow fee acquisition to be concentrated in those areas needed for direct visitor use, while acquisition funds can be spent to protect a larger surrounding area through easements than would be possible by using the same dollar amounts for the acquisitions.

U.S. Code Cong. and Admin. News, p. 6655 (1974). (Emphasis added). Furthermore:

> The [annual acquisition program report, required by § 460ff-2(a)] should reflect the intent of the Committee that the use of scenic easements should be an important feature of the land acquisition program for the recreation area. To achieve the maximum degree of protection for the valley with the authorized funding, the Secretary should plan to emphasize

> Fee aquisition in the areas directly needed for public use, while easements are used to preserve the character of the area. Id., p. 6657. (Emphasis added).

Clearly, the "emphasis" or "concentration" on fee acquisitions in areas needed for direct park visitor use cannot be construed to limit the Secretary's statutory eminent domain power to instances when acquisition of fee title is only needed for direct park visitor use. Indeed, the only reason for inclusion of the "emphasis" and/or "concentration" language in the legislative history is the recognition of budgetary constraints in establishing the CVNRA. Upon examination, this court holds that, contrary to the plaintiffs' claim, the legislative history of the CVNRA Act supports the findings made above regarding Congressional reliance on the professional judgment of the Secretary with respect to acquisition of fee titles to those properties necessary to fulfill the purposes of the CVNRA. Therefore, the Secretary need not establish

that properties scheduled for fee acquisition are required for a direct park visitor use prior to the invocation of his statutory eminent domain power. Indeed, the Secretary need not establish that fee acquisition in necessary for direct park visitor use at any time.

As noted above, the plaintiffs also contend that even if the defendants acquire fee title under 16 U.S.C. § 460ff-1(c), they can only do so subject to the owner's rights to elect a life estate or a term of years less than or equal to twenty-five (25) years under 16 U.S.C. § 460ff-1(f). In pertinent part, 16 U.S.C. § 460ff-1(f) provides that "[t]he owner of an improved property...on the date of its acquisition, as a condition of such acquisition, may retain for himself, his heirs, and assigns a right of use and occupancy of the improved property for noncommercial residential or agricultural purposes, as the case may be, for a definite term of not more than twenty-five years, or for his life, or the life of his spouse, whichever is later." The statute further provides that "[t]he owner shall elect the term to be

reserved." In their motion for summary judgment the defendants do not dispute the fee owner's retention rights once fee title is acquired through the statutory eminent domain power. Since the defendants concede that once the property is acquired, the owner, if he so desires, may exercise his retention rights, there is no issue before the court in regard to retention rights on which a ruling is necessary.

Accordingly, the defendants' joint motion for summary judgment on the plaintiffs' first claim is granted. Fed. R. Civ. P. 56. See: Smith v. Hudson, 600 F.2d 60 (6th Cir.), cert. denied, 444 U.S. 986, 100 S. Ct. 495 (1979).

The plaintiffs' second contention may be divided into two parts: first, the plaintiffs claim that the defendants' land acquisition plan is not supported by a reasonable, detailed or lawfully prepared EIS in violation of the National Environmental Policy Act. 42 U.S.C. § 4331 et seq. For the reasons which follow the court holds both of these claims are without merit.

16 U.S.C. § 460ff-5(b) provides in pertinent part:

> Within one year from the date of establishment of the recreation area pursuant to sections 460ff to 460ff-5 of this title, the Secretary shall, after consulting with the Governor of the State of Ohio, develop and transmit to the Committees on Interior and Insular Affairs of the United States Congress a final master plan for the development of the recreation area consistent with the objectives of sections 460ff to 460ff-5 of this title, indicating:
>
> (1) the faclities needed to accommodate the health, safety, and recreation needs of the visiting public;
>
> (2) the location and estimated cost of all facilities; and

(3) the projected need for any additional facilities within the area.

(Emphasis added).

Clearly, 16 U.S.C. § 460ff-5(b) requires the Secretary to "develop and transmit to the Committees on Interior and Insular Affairs...a final master plan for the development of the recreation area consistent with the objectives of sections 460ff to 460ff-5..." In response to this requirement, the National Park Service submitted a "Draft Management Plan" for the CVNRA on June 25, 1976. A final version of the plan was issued in July 1977. In both form and content the two plans are the same and no indication exists that the Committees on Interior and/or Insular Affairs were dissatisfied with them.

16 U.S.C. § 460ff-5(b) makes no reference to the Secretary's statutory power of eminent domain under 16 U.S.C. § 460ff-1(c). The legislative history of 16 U.S.C. § 460ff-5(b) reveals that the "Final Master Plan" was only to serve as an informational source to Congress:

> In addition, the Secretary is to prepare and transmit to the appropriate Committees within one year from the date of establishment of the recreation area, a master plan for development of the area consistent with the objectives of the bill. This plan is to include descriptions, locations, and estimated costs of all such facilities, as well as the projected need for any additional facilities. Further development authorizations may then be based on the information developed through this plan. The short deadline for submission of this plan is in recognition of the previous work done at the State and local level, particularly

in working with the Bureau of Outdoor Recreation in planning for the protection and use of the valley, as well as prior National Park Service feasibility studies. These planning efforts should be the basis for preparing a plan which takes into account the recreational efforts in the surrounding jurisdictions. The plan could then give special attention to items such as transportation systems for the area.

The legislative history of 16 U.S.C. § 460ff-5(b) provides no indication that Congress intended the adequacy of the master plan to serve as a legal standard upon which a homeowner in the CVNRA could challenge the Secretary's eminent domain decisions or upon which the judiciary could review them. In any event, such a judicial action would be contrary to the holding of Berman v. Parker, supra. If, in enacting the CVNRA Act, Congress had intended the Master Plan required under 16 U.S.C. § 460ff-(b) to be open to challenge by private property owners alleging deficiencies and/or subject to judicial review

in the federal courts, such purposes and powers would have been expressly set forth in the Act. Since they were not so expressed this court will not imply them. Accordingly, the defendants joint motion for summary judgment claim that the defendants' land acquisition plan is in violation of 16 U.S.C. §460ff-5(b) is granted.[10]

---

10. In light of this court's holding that the requirements of 16 U.S.C. § 460ff-5(b) do not invest the plaintiffs with a right of action in regard to the Secretary's use of the statutory eminent domain power, their contentions with regard to the "detailed plan" required under 16 U.S.C. § 460ff-2(a), infra, are untenable. Once again, there is no indication that the Committees on Interior and/or Insular Affairs were dissatisfied with the reports submitted by the National Park Service in accordance with this statute. 16 U.S.C. § 460ff-2(a) provides as follows:

10. (Continued)

Within one year after December 27, 1974, the Secretary shall submit, in writing, to the Committees on Interior and Insular Affairs and to the Committees on Appropriations of the United States Congress a detailed plan which shall indicate:

(i) the lands and areas which he deems essential to the protection and public enjoyment of this recreation area,

(ii) the lands which he has previously acquired by purchase, donation, exchange, or transfer to the purpose of this recreation area, and

(iii) the annual acquisition program (including the level of funding) which he recommends for the enusing five fiscal years.

(Emphasis added.)

The plaintiffs' final contention is that the defendants' land acquisition plan is not supported by a reasonable, detailed or lawfully prepared EIS in violation of the National Environmental Policy Act. 42 U.S.C. § 4331 et seq. For the reasons which follow the court holds that this issue must be resolved in favor of the defendants.

The National Environmental Policy Act of 1969, (hereinafter, NEPA), was enacted by Congress for the purpose of protecting the environment in the United States. The Act's broad goals are contained in 42 U.S.C. § 4331(a) which provides as follows:

> The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development

> of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other reqirements of present and future generations of Americans.

Under 42 U.S.C. § 4332(2)(c), all agencies of the federal government are required to "include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement," setting forth "(i) the environmental impact of the proposed action, (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented, (iii) alter-

natives to the proposed action, (iv) the relationship between the local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should be implemented." Clearly, the purpose of an EIS is to provide a review mechanism by which agency officials can avoid potentially serious environmental effects of agency action.

By its very terms, NEPA applies to all federal agencies. 42 U.S.C. § 4332 provides:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public law of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter ...

Although no exceptions are provided by the statute, courts are divided on the question of whether an alleged failure to satisfy the requirements of NEPA constitutes a valid defense to an eminent domain action instituted by an agency of the federal government. Compare: United States v. 255.25 Acres of Land, 553 F.2d 571 (8th Cir. 1977); United States v. 178.15 Acres of Land, 543 F.2d 1391 (4th Cir. 1976); United States v. 45,149.58 Acres of Land. 455 F. Supp. 192 (E.D. N.C. 1978); United States v. Three Tracts of Land, 377 F. Supp. 631 (N.D. Ala. 1974), for the proposition that failure to comply with the requirements of NEPA is not a defense; with United States v. 18.2 Acres of Land, 442 F. Supp. 800 (E.D. Calif. 1977); United States v. 247.37 Acres of Land, 3 ERC 1098 (S.D. Ohio 1971): Gibson v. Ruckelshaus, 3 ERC 1028 (E.D. Tex. 1971), for the proposition that failure to comply with the requirements of NEPA is a valid defense. See generally: United States v. 0.16 Acres of Land, 517 F. Supp. 1115 (E.D. N.Y. 1981). This court concurs

with the following reasoning employed in United States v. 18.2 Acres of Land, supra, 442 F. Supp. at 807:

> The United States contends that the mere taking of title cannot be said to have any effect on the environment. However, in order for a taking to be valid, it must be for a public use. Thus, a condemnation action, by its very nature, is a decision to put land to a certain public use, which may have a significant effect on the environment. The taking and the use cannot be viewed separately: either the taking is for a public use, which requires NEPA evaluation, or it is not for a public use, in which case it is an improper exercise of eminent domain....
>
> This court does not intend to suggest that the government must prepare an EIS in conjunction with every attempt to condemn property for public use, or even, for that matter, than an EIS is required in this case. It is sufficient at

this point to hold simply that the decision to condemn land for a public use, just like any other federal agency decision, is subject to the application of NEPA. Whether or not an Environmental Impact Statement is required will still turn, as it does in any other context, on whether or not the agency's action is a major federal action significantly affecting the environment. (Emphasis added).

In City Blue Ash v. McLucas, 596 F.2d 709 (6th Cir. 1979), the Sixth Circuit Court of Appeals in confronting a NEPA issue found that "[c]ourts which have sought to define "major federal action" have done so in terms of such requirements as "substantial planning, time, resources, or expenditure." 596 F2d at 711. (Citations omitted). It is clear, however, that "mere neighborhood opposition to federal action" does not mandate that an EIS be prepared. Cobble Hill Ass'n, v. Adams, 470 F. Supp. 1077, 1087

N. 6 (E.D. N.Y. 1979). See Also; State v. Andrus, 483 F. Supp. 255 (D. N.D. 1980). See generally; Sierra Club v. Hassell, 636 F.2d 1095 (5th Cir. 1981). Since creation and maintenance of the CVNRA has required a great deal of planning, time, resources and expense, this court holds that the Secretary's land acquisition plan constituted "major federal action" and, therefore, was subject to complying with the requirements of NEPA. For the reasons which follow the court further holds that the Secretary so complied.

Rather than file an EIS delineating its plans for the CVNRA, the National Park Service published a "negative statement" in the Federal Register. This statement provided that the National Park Service has determined that its plan for the CVNRA would not have a significant environmental impact and, therefore, no EIS would be prepared. At the same time the National Park Service made available to the public an "Environment Review" and an "Environmental Assessment." The latter document consists

of 266 pages and provides a detailed examination of three alternative proposals for development of the CVNRA. With respect to each of the three alternatives, the "Environmental Assessment" addresses numerous effects of park visitors as well as other agency actions on: (1) the natural environment, including soils, waterways, vegetation, wildlife, air quality and noise; (2) cultural resources, including, protection for historic structures; (3) the socio-economic environment, including recreational activities and the development of local communities; and (4) existing features and developments in the Cuyahoga Valley, such as impacts on roads and highways. The "Environmental Assessment" also addresses: (1) unavoidable adverse impacts; (2) irreversible and irretrievable commitments of resources; (3) mitigating measures; (4) the relationship to short run uses of the environment; and (5) the maintenance and improvement of long run productivity for each of the three alternatives considered.

It is well established that the decision as to whether and EIS need be prepared for a particular federal action lies with the federal agency implementing such action. Hanley v. Kleindienst, 471 F.2d 823, 828 (2d Cir. 1972), cert. denied, 444 U.S. 1073, 100 S. Ct. 1019 (1980); Mid-Shiawassee County Concerned Citizens v. Train, 408 F. Supp. 650 (E.D. Mich. 1976), aff'd., without opinion, 559 F.2d 220 (6th Cir. 1977). The National Park Service made such a decision when it published its "negative statement" in the Federal Register. Therefore, the determinative question presented to this court is whether the decision of the National Park Service was warranted. Resolution of this issue, however, initially requires an analysis of the proper standard to be applied on judicial review.

In Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 558, 98 S. Ct. 1197, 1219 (1978), the United States Supreme Court held that although NEPA established "significant substantive goals for the nation," it imposed duties on federal agencies that are "essentially procedural." Subsequently, in

Stryker's Bay Neighborhood Council, Inc. v.Karlen, 444 U.S. 223, 226, 100 S. Ct. 497, 500 (1980), the Court held that a federal agency, in selecting a course of action, need not "elevate environmental concerns over other appropriate considerations." Indeed, the Court further held that, [o]n the contrary, once an agency has made a decision subject to NEPA's procedural requirements, the only role for a court is to insure that the agency has considered the environmental consequences; it cannot 'interject itself within the area of discretion of the executive as to the choice of action to be taken'." Stryker's Bay Neighborhood Council, Inc. v. Karlen, supra, 444 U.S. at 226, 227, 100 S. Ct. at 500. Concerning the scope and standard of judicial review, the holdings of Vermont Yankee and Stryker's Baywere succinctly integrated by the First Circuit Court of Appeals in Grazing Fields Farm v. Goldschmidt, 626 F.2d 1068,

1071, 1072 (1st Cir. 1980) in which the court reasoned:

> ...There are two aspects to a court's review of an agency decision subject to the requirements of NEPA. First, the court makes a substantive review of the agency's action to determine if such action is arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706. This substantive review, although conducted on the basis of the entire administrative record, is quite narrow in scope. The court should only assure itself that the agency has given good faith consideration to the environmental consequences of its actions and should not pass judgment on the balance struck by the agency among competing concerns.

(Citation omitted). (Footnote omitted). See also: Commonwealth of Kentucky v. Alexander, 655 F.2d

714 (6th Cir. 1980); Warm Springs Dam Task Force v. Gribble, 612 F.2d 1017 (9th Cir. 1980). See generally: Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 91 S. Ct. 814 (1971).

Accord: Clark Park Citizens for Action v. City of Detroit, 503 F. Supp. 1099 (E.D. Mich. 1980); Mid-Shiawassee County Concerned Citizens v. Train, supra.[11]

> "...Second, a reviewing court must assess the agencies compliance with the duties NEPA places upon it. These duties are 'essentially procedural.'"

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11. 5 U.S.C. § 706 provides as follows:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--

11. (Continued)

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be--

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

11. (Continued)

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Grazing Field Farm v. Goldschmidt, supra, 626 F.2d at 1072. (Citation omitted). As noted above," [t]he primary procural mechanism embodied in NEPA is the requirement that an agency prepare "a detailed statement" discussing inter alia, "alternatives to the proposed action," 42 U.S.C. § 4223(2)(c)." Id. Simiarly, when an agency concludes that an EIS is not required, its conclusion must be supported by a statement of adequate reasons. Mt. Airy Refining Co. v. Schlessinger, 481 F. Supp. 257 (D.D.C. 1979).

In their brief in support of their joint motion for summary judgment the plaintiffs argue that the preparation of an EIS for the CVNRA was necessary for two reasons: (1) the CVNRA will have a dramatic socio-economic impact on the residents of the Cuyahoga Valley; and (2) the CVNRA is a "controversial" project.

In Breckenridge v. Rumsfeld, 537 F.2d 864 (6th Cir. 1976), cert. denied, 429 U.S. 1061, 97 S. Ct. 785 (1977), the plaintiffs challenged a decision of the United States Army to reduce jobs and transfer personnel from a military base located in Lexington, Kentucky on the ground that the decision had been made without preparing an EIS. The district court enjoined the proposed transfer until a formal EIS was prepard by the Army. The Sixth Circuit Court of Appeal reversed. The court reasoned that although NEPA had been construed to apply to socio-economic impacts "beyond...the physical environment..., this has been done only where there existed a primary impact on the physical environment." Breckenridge v. Rumsfeld, supra, 537 F.2d at 865, 866. The court further found that "[e]nvironmental goals and policies were never intended to reach social problems such as those presented here." Id. at 867. (Citation omitted). Clearly, under Breckenridge, allegations of economic disclocation and the like caused by the Secretary's land acquisition practices are not

cognizable under NEPA. It is equally clear that the Secretary's acquisition of fee title from a private property owner has no effect on the physical or natural environment. Thus, the plaintiffs' claim that an EIS should have been prepared for the CVNRA on the ground of socio-economic impact is without merit.

Similarly, the plaintiffs' contention that an EIS should have been prepared because the CVNRA is a "controversial" project does not withstand examination. "The expression 'controversial' relates to situations where a substantial dispute exists as to the environmental effects of the proposed action and not merely to opposition to the intended use of the project." State v. Andrus, supra, 483 F.Supp. at 261. No such dispute exists in the present case. Indeed, in light of the expressed purpose of the CVNRA, 16 U.S.C. § 460ff,[12] this court finds any allegations to the contrary untenable. As noted above, "mere neighborhood opposition to federal action" does not mandate that an EIS be filed.

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12. See: F.N. 1, supra.

This court has examined in detail: (1) the briefs in support of the parties' motions; (2) the CVNRA "Draft Management Plan" of 1976; (3) the CVNRA "Final Management Plan" of 1977; (4) the "Environmental Assessment" for the CVNRA completed in support of the decision of the National Park Service not to file an EIS in 1977; and (5) the administrative record on file in this case and holds: (1) that the National Park Service, as the delegate agency of the Secretary of the United States Department of the Interior, in good faith, considered the environmental consequences of the land acquisition plan deemed necessary for creation and maintenance of the CVNRA; and (2) that the decision of the National Park Service not to file an EIS was neither arbirtary nor capricious. Indeed, the court further holds that the decision as fully in accordance with law. See: Stryker's Bay Neighborhood Council, Inc. v. Karlen, supra; Vermont Yankee Nuclear Power Corp. v. NRDC, supra; Grazing Fields Farm v.

Goldschmidt, supra; Mid-Shiawassee County Concerned Citizens v. Train, supra.

Accordingly, the defendants' joint motion for summary judgment is granted and the plaintiffs' joint motion for summary judgment is denied. See: Smith v. Hudson, 600 F.2d 60 (6th Cir.), cert. denied, 444 U.S. 986, 100 S. Ct. 495 (1979); Bryant v. Commonwealth of Kentucky, 490 F.2d 1273 (6th Cir.), cert. denied, 396 U.S. 990, 90 S. Ct. 480 (1969); Smith v. Huntington Publishing Co., 410 F. Supp. 1270 (S.D. Ohio 1975), aff'd., without opinion, 535 F.2d 1235 (6th Cir. 1976).

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CUYAHOGA VALLEY HOMEOWNERS AND RESIDENTS ASSOCIATION, et. al., Plaintiffs,	CASE NO. C78-1377
v.	JUDGE JOHN M. MANOS (Filed April 13, 1982)
CECIL D. ANDRUS, et. al., Defendants	O R D E R

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date the defendants' joint motion for summary judgment is granted and the plaintiffs' joint motion for summary judgment is denied.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

CUYAHOGA VALLEY HOMEOWNERS AND RESIDENTS ASSOCIATION, et. al. Plaintiffs	CASE NO. C78-1377
	JUDGE JOHN M. MANOS
	(Filed May 7, 1982)
v.	
CECIL D. ANDRUS, et. al. Defendants.	NOTICE OF APPEAL

The Plaintiffs in this action hereby notify the Court, and all parties to this lawsuit that they are appealing the District Court's final judgment entered herein on April 13, 1982 to the Sixth Circuit Court of Appeals.

Respectfully Submitted,

/s/ Barton J. Craig

Barton J. Craig
Attorney for Plaintiffs
725 St. Clair Avenue, N.W.
Cleveland, Ohio 44113
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82-3324
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CUYAHOGA VALLEY HOME-OWNERS AND RESIDENTS ASSOCIATION, DAVID HAZELWOOD et. al., Plaintiffs-Appellants, v. CECIL D. ANDRUS, Secretary of the Interior; WILLIAM H. WHALEN, Director, Department of the Interior; WILLIAM BIRDSELL, Supt. Cuyahoga Valley National Recreation Area Defendants-Appellees.	O R D E R (Filed July 6, 1983)

BEFORE: KEITH and MERRITT, Circuit Judges and DeMASCIO*.

The plaintiffs, Cuyahoga Valley Homeowners and Residents Association, et. al., brought this class action seeking injunctive and declaratory relief. They sought inter alia a judicial interpretation of the extent of the defendants' authority under the Cuyahoga Valley National Recreation Act (CVNRA) 16 U.S.C. § 460ff. et. seq. Of particular concern to the plaintiffs was the defendants' ability to acquire single family residential property located within the boundaries of the CVNRA through eminent domain proceedings. Both parties filed motions for summary judgment. On April 13, 1982, the Court issued a Memorandum of Opinion granting the defendants' motion for summary judgment.

On appeal three issues are presented for review. The first issue is whether the district court lacked jurisdiction. The second issue is whether the district court erred in determining that the Act affords the defendants broad discretion to determine which properties should be condemned.

The third and final issue is whether the Act denies plaintiffs due process of law.

As a threshold matter, the defendants contend that the district court lacked jurisdiction. The stated basis for jurisdiction was 28 U.S.C. §1331 (Federal Question) and 28 U.S.C. §2201 (Declaratory Judgment Act). The defendants argue that the plaintiffs have not asserted a federal question. Rather they maintain that the complaint merely alleges a defense to a condemnation proceeding.

While it is clear that the plaintiffs are seeking an interpretation of a federal statute, their action appears to be predicated as much upon an abstract question as upon an actual controversy. The difference is a matter of degree. But, where there is a substantial dispute touching some real interest, the case is appropriate for declaratory judgment. C. Wright, Federal Courts 498 (3rd ed. 1976), citing Evers v. Dwfyer, 358 U.S. 202 (1958). Because no actual condemnation proceedings have been initiated against these plaintiffs,

their action seems a bit premature. However, given the presence of an imminent threat, we decline the defendants' invitation to dispose of this case on the jurisdictional basis.

The plaintiffs' primary argument involves an interpretation of the CVNRA, which was passed by Congress on December 27, 1974. That Act provides that a certain body of land located in Ohio and known as the Cuyahoga Valley shall be converted into a national park. The Secretary of the U.S. Department of the Interior is authorized, under the Act, to employ the power of eminent domain to acquire those parcels of land required for park use. The Act also contains certain explicit restrictions with regard to the acquisition of residential properties encompassed within the definition of "improved property." 16 U.S.C. §460ff-1(e). As defined, improved property includes "a detached single family dwelling, the construction of which [began] on January 1, 1975, together with...the land on which the dwelling is situated."

Id.

The challenged provision governing eminent domain states in relevant part:

> With respect to improved properties, as defined in section 460ff to 460ff-5 of this title, the Secretary may acquire scenic easements or such other interests as, in his judgment, are necessary for the purposes of the recreation area. Fee title to such improved properties shall not be acquired unless the Secretary finds that such lands are being used, or are threatened with uses, which are detrimental to the purposes of the recreation area, or unless such acquisition is necessary to fulfill the purposes of sections 460ff to 460ff-5 of this title. (Emphasis added.)

On appeal, the plaintiffs

argue that the district court erred by failing to narrowly construe this controlling statutory provision. Specifically, they contend that "improved property" can only be condemned when its use would be "detrimental" to the park or when it is needed for "direct visitor use". We disagree.

The district court properly gleaned the purpose of the CVNRA as "preserving and protecting the public use and public enjoyment the historic, scenic, natural and recreational values of the Cuyahoga River..." 16 U.S.C. § 460ff-1(c). The Act clearly states that the Secretary may acquire scenic easements or other interests as, in his judgment, are necessary. This provision obviously vests wide discretion in the Secretary to determine when the use of eminent domain is appropriate.

The judiciary's role in determining whether the power of eminent domain is being exercised for a public purpose is very narrow. Berman v. Parker, 348 U.S. 26 (1954). "Once the question of the public purpose has been decided the amount and character

of land for the project and the need for a particular tract to complete the integrated plan rests in the discretion of the legislative branch." Berman, 348 U.S. at 35. In light of this narrow scope of review, we find the district court properly construed the challenged provision.

Finally, the plaintiffs contend that the statute violates the due process clause. They attempt to argue that when the government infringes upon "family needs" and "family values" the impinging legislation must satisfy an especially high standard of review. See Moore v. City of East Cleveland, 431 U.S. 494 (1977). However, Moore involved a city ordinance which restricted the occupancy of a dwelling to family members. The ordinance also gave a restrictive definition of "family". The Court invalidated the ordinance under the due process clause because the ordinance only marginally served the city's legitimate interests. That decision was firmly based upon the sanctity of the "family". It is, therefore, inapposite to the present controversy. The Supreme Court has stated that when the

government condemns property via eminent domain, the due process which is owed the property owner is "just compensation". Berman, 348 U.S. at 36.

In conclusion, we note that the opinion of the Honorable John M. Manos comprehenively reviews the plaintiffs asserted claims. We find no error in the court's resolution of the issues presented below.

Accordingly, the judgment of the district court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

CASES DELINEATING THE HIGH DEGREE OF CONSTITUTIONAL PROTECTION FROM GOVERNMENTAL INTRUSION AFFORDED FAMILY PRIVACY IN THE HOME

See Boyd v. United States, 116 U.S. 616, 622, 625-631, 634-635, (1886); Adams v. New York, 192 U.S. 585, 598, (1904); Weeks v. United States, 232 U.S. 383, 291-395, (1914); Gouled v. United States, 255 U.S. 298, 307-311, (1921); Amos v. United States, 255 U.S. 313, 317, (1921); Hester v. United States, 265 U.S. 57, 59 (1924; Carroll v. United States, 267 U.S. 132, 147-153, (1925); Agnello v. United States, 269 U.S. 20, 33, (1925); Byars v. United States, 273 U.S. 28, 30, 32-33, (1927); United States v. Berkens, 275 U.S. 149, 155, (1927) United States v. Lee, 274 U.S. 559, 562-563, 1927); Olmsted v. United States, 277 U.S. 438, 464, (1928); Go-Bart Co. v. United States. 282 U.S. 344, 356-358, (1931); United States v. Lefkowitz, 285 U.S.

452, 463-464, (1932); Taylor v. United States, 286 U.S. 1, 5-6, (1932); Nathanson v. United States, 290 U.S. 41, 46-47, (1933); Davis v. United States, 328 U.S. 582, 592-594, (1946); Harris v. United States, 331 U.S. 145, 151, fn. 15, (1947); Johnson v. United States, 333 U.S. 10, 13-15, (1948); Trupiano v. United States, 334 U.S. 699, 705-710, (1948); McDonald v. United States, 355 U.S. 451, 454-456, (majority), 458-460, 69 S. Ct. 194-196 (Jackson, concurring) (1948); Lustig v. United States, 338 U.S. 74, 78-80 (1949); Brinegar v. United States, 338 U.S. 160, 180-181, (Jackson, dissenting) (1949); United States v. Jeffers, 342 U.S.48, 51-54, (1951); Silverman v. United States, 365 U.S. 505, 509-512 (1961) ("The Fourth Amendment and the personal rights which it secures have a long history. At the very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.") Chapman v. United States, 365 U.S.

610, 613-618, (1961); Lanza v. New York, 360 U.S. 139, 143, (1962); Wong Sun v. United States, 371 U.S. 471, 480, fn. 8, 484-487, (1963); Ker v. California, 374 U.S. 23, fn. 14, (Justice Clark's Opinion), 47-64, (Justice Brennen's Opinion) (1963); Fahy v. Connecticut, 375 U.S. 85, 87-92, (1963); Stoner v. California, 376 U.S. 483, 486-490 fns. 4, 5, (1964); Clinton v. Virginia, 377 U.S. 158, (1964); Lewis v. United States, 385 U.S. 206, 213, (Justice Brennan, concurring) (1966); Hoffa v. United States, 385 U.S. 293, 300-303, (1966); Camara V. Municipal Court of the City and County of San Francisco, 387 U.S. 523, 528-534, (1967); See v. City of Seattle, 387 U.S. 541, 543, (1967); Berger v. New York, 388 U.S. 41, 44, 49-53, 58, 63-64, (1967).

TESTIMONY OF WILLIAM BIRDSELL, SUPERINTENDENT OF THE CVNRA, AT HIS FEBRUARY 7, 1979 DEPOSITION, PAGES 26-27, 30-32, WHEREIN HE ADMITS STATING THAT THE DECISION TO ACQUIRE FEE TILE TO FAMILY HOMESTEADS IS ARBITRARY

"Q. Is there anything at all, in the determination to condemn improved residential property in fee simple rather than in scenic easement, that you consider arbitrary?

A. No. Absolute not.

Q. Absolutely not?

A. Absolutely not.

Q. Okay. You have taken the position that there is nothing in the decision to condemn residential property in fee simple rather than scenic easement that you view as arbitrary?

A. Right.

Q. Do you recall speaking at a meeting of the Cuyahoga Valley Homeowners and Residents Association on March 23, 1978?

A. I don't know that specific date. I know that I have spoken to them.

Q. It was about that time. And you were asked questions about, at that time, the fee simple as opposed to scenic easement--taking decisions?

A. Oh-huh

Q. Okay.

A. I may have been.

MR. FRENCH: Do you recall:

THE WITNESS: No, I don't really recall.

Q You don't recall being asked those questions?

A. No, not specifically.

Q. You don't recall being asked questions about the fee simple, rather than the scenic easement--taking decision?

A. I could have been. I talk to groups three or four times a week. I get lots of different question.

Q. You could have been asked?

Let me ask you if this refreshes your recollection of what occurred on that evening?

MR. FRENCH. I will object.

(Thereupon, the following statements were played from a tape cassette.)

..."Yes. The actual guiding light is, as I said, the kind

of Bible that we are using is the General Management Plan, which is a master plan.

...That, with our planning team, is what gave guidance in determining fee and easement; plus the Law which we have, which asked us to consider easement for those single-family residential dwellings whenever possible.

So with park development in mind, and with the needs of those who lived there at the time of the law in mind, is how the determination was made. It was not blindly considered, as somebody--some have said 'It is arbitrary conditions.' It isn't.

It is in some cases very arbitrary, based on the plan. But in no way is it always arbitrary because a great deal has gone into this decision.

(The foregoing were played off a cassette tape.)

THE WITNESS (Birdsell): It makes a lot of difference, than taking it out of context.

BY MR. CRAIG:

Q. But you did admit that it was arbitrary?

A. Based on the plan.

Q. Based on the plan?

A. That was my statement"

TESTIMONY OF WILLIAM BIRDSELL, SUPERINTENDENT OF THE CVNRA, AT HIS AUGUST, 1979 DEPOSITION AT PAGES 217-219 STATING THAT 300 OF THE ORIGINAL 500 FAMILY HOMESTEADS WERE DESIGNATED BY THE NATIONAL PARK SERVICE FOR FEE ACQUISITION

"Q. Okay. Mr. Birdsell, how many single-family residences, which constitute improved property, are located within the Cuyahoga Valley National Recreation Area?

A. I have been told, approximately, and I have never been able to pin it down because we are still mapping, but approximately 300.

Q. And how many of those single-family residences, which constitute improved property under the Park Act, have --

A. Pardon me. Let me correct that. 500 of which 300 have been acquired.

Q. It is fair to say that there are 500 single-family residential improved properties located within the park?

MR. FRENCH: Objection.

A. That is a good guess, but I would not be held to that figure exactly.

Q. But is it approximately 500?

MR. FRENCH: As of what date?

MR. CRAIG: As of the date the Act became effective

A. Which Act?

Q. The Cuyahoga Valley National Recreation Act, 1974.

A. The original Act. I think that would be a reasonable figure, 500 as of that date.

Q. How many of those single-family residential improved properties which existed as of the date of the effectiveness of the Act have been acquired by the park in fee?

MR. FRENCH: Objection.

A. Approximately 300.

Q. How many of those single-family residential improved properties that have been acquired in fee have been acquired after a condemnation act was filed, to the best of your knowledge?

A. I don't know.

Q. You have no idea whatsoever?

A. No, because there are different condemnation actions, declaration of taking and complaint actions, and so I don't know.

Q. Let me rephrase my question. Taking into consideration every single-family residential improved property that has ever been identified as located within the boundaries of the Cuyahoga Valley National Recreation Area since the inception of that area, how many single-family residential improved properties are there?

MR. FRENCH: If you know.

A. I don't know, but it would be substantial because of some recent additions.

Q. How many more than 500 would it be, approximately?

A. I don't know. I would guess, perhaps, double that, maybe even more.

Q. In other words, the addition is double the number of single-family residential improved properties located within the Recreation Area?

A. Yes. Subsequent legislation has deleted a great number and added a great many more.

Q. And how many has the Recreation Area acquired in fee, single-family residential improved property, acquired in fee?

A. The figure that comes to mind is around 300, I believe.

TEXT OF LETTER FROM CONGRESSMAN SEIBERLING AND SENATOR METZENBAUM DATED MARCH 14, 1980 INSTRUCTING THE NATIONAL PARK SERVICE TO IMMEDIATELY DISMISS ALL PENDING FEE TITLE CONDEMNATIONS OF SINGLE FAMILY RESIDENCES IN THE CVNRA.

United States Senate
Committee on the Judiciary
Washington, D.C. 20310

March 14, 1980

William J. Whalen, Director
National Park Service
U.S. Department of the Interior
Washington, D.C. 20240

Dear Mr. Whalen:

Having reviewed the impact of recent developments on the land acquisition program in the Cuyahoga

Valley National Recreation Area, there are several facts that are of immediate concern to us.

First, rapidly rising land values have substantially increased the cost of acquiring land for the park. Now, funds available for National Park Service land acquisition in FY 81 are expected to be severely reduced as part of the strenuous effort being made to bring the Federal budget into balance. Moreover, as you know, some residents in the park have voiced strong objections to the prospective purchase of fee title to their homes.

With these concerns in mind, we recommend that the National Park Service thoroughly reevaluate its land acquisition program in the Cuyahoga Valley National Recreation Area and, in the meantime that all individual residents whose land is subject to complaint action be notified that suit will be suspended or dropped unless the resident expressly requests completion of the complaint action.

While we regret that these circumstances may slow the complete development of this magnificent recreational asset for the people of Ohio and the nation, we recognize that the battle against inflation must have priority over other programs and that this is an appropriate time to reevaluate the land acquisition program in Cuyahoga.

Sincerely,

/s/ John Sieberling
John Sieberling

/s/ Howard Metzenbaum
Howard Metzenbaum

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION:

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

28 U.S.C. § 1254:

Cases in the courts of appeals maybe reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1291:

The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virginia Islands, except where a direct

review may be had in the Supreme Court.

28 U.S.C. § 1331:

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C § 2201:

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1954 or a proceeding under section 505 or 1146 of title 11, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

16 U.S.C.§ 460ff-1(c):

With respect to improved properties as defined in sections 460ff to 460ff-5 of this title, the Secretary may acquire scenic easements or such other interests as, in his judgment, are necessary for the purposes of the recreation area. Fee title to such improved properties shall not be acquired unless the Secretary finds that such lands are being used, or are threatened with uses, which are detrimental to the purposes of the recreation area, or unless such acquisition is necessary to fulfill the purposes of sections 460ff to 460ff-5 of this title.

16 U.S.C. § 460ff-1(e)

For the purposes of sections 460ff to 460ff-5 of this title, the term "improved property" means: (i) a detached single family dwelling, the construction of which was begun before January 1, 1975 (hereafter referred to as "dwelling"), together with so much of the land on which the dwelling is situated, the said land being in the same ownership as the dwelling, as the Secretary shall designated to be reasonably necessary for the

enjoyment of the dwelling for the sole purpose of noncommercial residential use, together with any structures necessary to the dwelling which are situated on the land so designated, or (ii) property developed for agricultural uses, together with any structures accessory thereto which were so used on or before January 1, 1975. In determining when and to what extent a property is to be considered an "improved property", the Secretary shall take into consideration the manner of use of such buildings and lands prior to January 1, 1975, and shall designate such lands as are reasonably necessary for the continued enjoyment of the property in the same manner and to the same extent as existed prior to such date. In applying this subsection with respect to lands and interests therein added to the recreation area by action of the Ninety-fifth Congress, the date "January 1, 1978," shall be substituted for the date "January 1, 1975," in each place it appears.

16 U.S.C. § 460ff-1(f)

The owner of an improved property, as defined in sections 460ff to 460ff-5 of this title, on the date of its acquisition, as a condition of such acquisition, may retain for himself, his heirs and assigns a right of use and occupancy of the improved property for noncommercial residential or agricultural purposes, as the case may be, for a definite term of not more than twenty-five years, or, in lieu thereof, for a term ending at the death of the owner or the death of his spouse, whichever is later. The owner shall elect the term to be reserved. Unless the property is wholly or partially donated, the Secretary shall pay to the owner the fair market value of the property on the date of its acquisition, less the fair market value on that date of the right retained by the owner. A right retained by the owner pursuant to this section shall be subject to termination by the Secretary upon his determination that it is being exercised in a manner inconsistent with the purposes of sections 460ff to 460ff-5 of this title, and it shall terminate by operation of law upon notification by the Secretary to the holder of the right of such determination and tendering to him the amount equal to the fair market

value of that portion which remains unexpired.

16 U.S.C. § 460ff-2:

Within one year after December 27, 1974, the Secretary shall submit, in writing, to the Committees on Interior and Insular Affairs and to the Committees on Appropriations of the United States Congress a detailed plan which shall indicate:

(i) the lands and areas which he deems essential to the protection and public enjoyment of this recreation area,

(ii) the lands which he has previously acquired by purchase, donation, exchange, or transfer for the purpose this recreation area, and

(iii) the annual acquisition program (including the level of funding) which he recommends for the ensuing five fiscal years.

It is the express intent of the Congress that the Secretary should substantially complete the land acquisition program contemplated by sections 460ff to 460ff-5 of this title within six years after December 27, 1974.

16 U.S.C. § 460ff-5(b)

For the development of the recreation area, including improvements of properties acquired for purposes of section 460ff to 460ff-5 of this title, there is authorized to be appropriated not more than $13,000,000. Within one year from the date of establishment of the recreation area pursuant to sections 460ff to 460ff-5 of this title, the Secretary shall, after consulting with the Governor of the State of Ohio, develop and transmit to the Committees on Interior and Insular Affairs of the United States Congress a final master plan for the development of the recreation area consistent with the objectives of sections 460ff to 460ff-5 of this title, indicating:

(1) the facilities needed to accommodate the health, safety, and recreation needs of the visiting public;

(2) the location and estimated cost of all facilities; and

(3) the projected need for any additional facilities within the area.

CERTIFICATE OF SERVICE

Three copies of the attached Petitition for Certiorari and Appendix were served on the attorney for all defendant respondents by regular United States mail on or about September 20, 1983 at the following address:

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